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Affin Bank Bhd v Dinesh Kanavaji a/l Kanawagi

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-251–06 OF 2020
WAN MUHAMMAD AMIN JC
17 SEPTEMBER 2021

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Civil Procedure — Disposal of case — Disposal of case on point of law — Plaintiff granted loan facilities to defendant for purchase of properties — Loan facilities secured by deeds of assignment — Defendant default in payment — Plaintiff filed application under O 14 of the Rules of Court 2012 — Defendant filed defence and counterclaim — Plaintiff filed application under O 14A of the Rules of Court 2012 against defendant's counterclaim — Whether loan agreements were separate and independent of deeds of assignment — Whether loan agreements and/or deeds of assignment frustrated by order of court — Whether frustration was self-induced — Whether defendant could maintain and/or succeed in his counter claim, which arose from his illegal and/or unlawful acts — Whether plaintiff failed to protect plaintiff's rights, title and interest in properties — Rules of Court 2012 O 14A

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Civil Procedure — Summary judgment — Action to recover monies loaned — Plaintiff granted loan facilities to defendant for purchase of properties — Loan facilities secured by deeds of assignment — Defendant default in payment — Plaintiff filed application under O 14 of the Rules of Court 2012 — Whether plaintiff had satisfied preliminary requirements of application under O 14 of the Rules of Court 2012 — Whether certificate of indebtedness was conclusive proof of amount owed — Whether plaintiff failed to protect plaintiff's rights, title and interest in properties — Rules of Court 2012 O 14

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The present action was in relation to 12-loan agreements ('the loan agreements') entered between the plaintiff and the defendant whereby the plaintiff had granted twelve loan facilities ('the facilities') to the defendant for the defendant to purchase twelve properties ('the properties') from Idaman Spectra Sdn Bhd. The facilities were secured by twelve deeds of assignment ('the deeds of assignment'). Due to the default in payment by the defendant, the plaintiff had filed an application ('O 14 application') under O 14 of the Rules of Court 2012 ('the ROC'). In a separate action ('the Trust's JBHC Suit'), the High Court had ordered ('the HC Order'), inter alia, that an entity known as Linggiu Valley Orang Asli (Jakuns) Trust ('the Trust') was the rightful owner of the properties. The HC's Order was upheld by the Court of Appeal ('the COA Order') and the Federal Court had dismissed the defendant's leave

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application. Upon being notified of the decision in the Trust's JBHC Suit, the plaintiff filed an action in the Kuala Lumpur High Court ('the KLHC Suit') to secure its right, but the action was struck out with liberty to file afresh. In the present application, the crux of the defendant's defence and counter claim was premised upon the defendant's allegation that the plaintiff had failed to protect the plaintiff's rights, title, and interest in the twelve properties. In the present action, the plaintiff had also filed an application under O 14A of the ROC ('O 14A application') against the defendant's counter claim for the determination of the following questions of law: (a) whether the loan agreements were separate and independent of the deeds of assignment ('question1'); (b) whether the loan agreements and/or the deeds of assignment were frustrated by the HC Order and the COA Order in the Trust's JBHC Suit ('question 2');and (c) whether the defendant could maintain and/or succeed in his counter claim, which arose from his illegal and/or unlawful acts ('question3').

Held, allowing the plaintiff's O 14 application with costs of RM10,000 and allowing the plaintiff's O14A application with costs of RM10,000:

(1) The plaintiff had exhibited its certificate of indebtedness to prove the correctness of the amount owed by the defendant to the plaintiff. The plaintiff had also satisfied the preliminary requirements of an O 14 application as set out by the Federal Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300. Therefore, based on the authorities cited regarding O 14 application read together with the authorities in respect of the conclusiveness of the certificate of indebtedness and there being no dispute in respect of, inter alia, the fact that the defendant had utilised the facilities and that the sums thereunder were disbursed, the plaintiff had made out a case for summary judgment under O 14 of the ROC and the only issue was whether the defendant had a defence on the merits or otherwise whether there was some other reason for a trial (see paras 37 & 40–41).

(2) It was trite that the plaintiff had the exclusive right to pursue both legal action against the defendant as borrower to recover monies due under the facilities and/or pursue its rights to recover monies through the securities given ie the properties. Further, under section 15.18 of the loan agreements, the defendant had expressly agreed that the defendant's repayment obligations to the plaintiff shall constitute separate and independent obligations. Based on the authorities cited by the plaintiff, it was clear that the loan agreements ought to be treated separately from the deeds of assignment. The loss of the twelve properties (the security) did not mean that the defendant was released from his contractual obligations under the loan agreements. In the circumstances, the court answered question 1 in the affirmative (see paras 77–78, 81–82 & 90).

(3) The fact of the matter was that based on the cases cited by the plaintiff and the findings of the High Court in the Trust's JBHC Suit as affirmed by the Court of Appeal (and Federal Court), the frustration alleged by the defendant was in fact self-induced and therefore could not discharge the defendant of his contractual obligations under the loan agreements and the defendant's obligation to repay the plaintiff for the sums due and owing under the facilities. As such, the court answered question 2 in the negative (see paras 102–103).

(4) It was clear that the defendant could not maintain his counter claim based on his illegal act and neither could he rely on estoppel against the plaintiff arising from that illegal act. Therefore, the court answered question 3 in the negative (see paras 111–112).

[Bahasa Malaysia summary

Tindakan semasa adalah berhubung dengan dua belas perjanjian pinjaman ('perjanjian-perjanjian pinjaman tersebut') yang dimasuki antara plaintif dan defendan di mana plaintif telah memberikan dua belas kemudahan pinjaman ('kemudahan-kemudahan tersebut') kepada defendan untuk defendan membeli dua belas hartanah ('hartanah-hartanah tersebut') daripada Idaman Spectra Sdn Bhd. Kemudahan-kemudahan tersebut telah dicagarkan dengan dua belas surat ikatan penyerahan hak ('surat-surat ikatan penyerahan hak tersebut'). Disebabkan oleh keingkaran dalam pembayaran oleh defendan, plaintif telah memfailkan permohonan ('permohonan A 14') di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Dalam tindakan berasingan ('Saman JBHC Amanah'), Mahkamah Tinggi telah memerintahkan ('Perintah MT'), antara lain, bahawa entiti yang dikenali sebagai Linggiu Valley Orang Asli (Jakuns) Trust ('Amanah tersebut') adalah pemilik sah hartanah-hartanah tersebut. Perintah MT tersebut telah dikekalkan oleh Mahkamah Rayuan ('Perintah MR') dan Mahkamah Persekutuan telah menolak permohonan kebenaran oleh defendan. Setelah dimaklumkan mengenai keputusan dalam Saman JBHC Amanah, plaintif memfailkan tindakan di Mahkamah Tinggi Kuala Lumpur ('Saman KLHC') untuk mendapatkan haknya, tetapi tindakan tersebut telah dibatalkan dengan kebebasan untuk memfailkan semula. Dalam permohonan ini, intipati pembelaan dan tuntutan balas defendan adalah berdasarkan dakwaan defendan bahawa plaintif telah gagal melindungi hak, hak milik dan kepentingan plaintif dalam dua belas hartanah tersebut. Dalam tindakan ini, plaintif juga telah memfailkan permohonan di bawah A 14A KKM ('permohonan A 14A') terhadap tuntutan balas defendan untuk penentuan persoalan-persoalan undang-undang berikut: (a) sama ada perjanjian-perjanjian pinjaman tersebut adalah berasingan dan bebas daripada surat-surat ikatan penyerahan hak tersebut ('soalan 1'); (b) sama ada perjanjian-perjanjian pinjaman tersebut dan/atau surat-surat ikatan penyerahan hak tersebut telah dikecewakan oleh Perintah MT dan Perintah MR dalam Saman JBHC Amanah ('soalan 2'); dan (c) sama ada defendan

boleh mengekalkan dan/atau berjaya dalam tuntutan balasnya, yang timbul daripada perbuatannya yang salah dan/atau menyalahi undang-undang ('soalan 3').

Diputuskan, membenarkan permohonan A 14 plaintif dengan kos RM10,000 dan membenarkan permohonan A 14A plaintif dengan kos RM10,000:

(1) Plaintif telah mengekshibitkan sijil keberhutangannya untuk membuktikan ketepatan jumlah yang terhutang oleh defendan kepada plaintif. Plaintif juga telah memenuhi keperluan awal permohonan A 14 seperti yang ditetapkan oleh Mahkamah Persekutuan dalam *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300. Oleh itu, berdasarkan autoriti-autoriti yang dipetik mengenai permohonan A 14 dibaca bersama dengan autoriti-autoriti berkenaan dengan sijil keberhutangan adalah konklusif dan tiada pertikaian berkenaan dengan, antara lain, fakta bahawa defendan telah menggunakan kemudahan-kemudahan tersebut dan bahawa jumlah wang di bawah kemudahan-kemudahan tersebut telah dikeluarkan, plaintif telah membuktikan kes bagi penghakiman ringkas di bawah A 14 KKM dan satu-satunya isu ialah sama ada defendan mempunyai pembelaan atas merit atau sebaliknya sama ada terdapat sebab lain untuk perbicaraan (lihat perenggan 37 & 40–41).

(2) Sudah menjadi undang-undang yang mantap bahawa plaintif mempunyai hak eksklusif untuk meneruskan kedua-dua tindakan undang-undang terhadap defendan sebagai peminjam untuk mendapatkan semula wang yang perlu dibayar di bawah kemudahan-kemudahan tersebut dan/atau meneruskan haknya untuk mendapatkan semula wang melalui sekuriti yang diberikan iaitu hartanah-hartanah tersebut. Selanjutnya, di bawah seksyen 15.18 perjanjian-perjanjian pinjaman tersebut, defendan telah secara nyata bersetuju bahawa obligasi pembayaran balik defendan kepada plaintif hendaklah membentuk obligasi berasingan dan bebas. Berdasarkan autoriti-autoriti yang dipetik oleh plaintif, adalah jelas bahawa perjanjian-perjanjian pinjaman tersebut adalah berasingan daripada surat-surat ikatan penyerahan hak tersebut. Kerugian daripada dua belas hartanah tersebut (cagaran) tidak bermakna defendan dilepaskan daripada obligasi kontraknya di bawah perjanjian-perjanjian pinjaman tersebut. Dalam keadaan tersebut, mahkamah menjawab soalan 1 secara afirmatif (lihat perenggan 77–78, 81–82 & 90).

(3) Hakikatnya adalah berdasarkan kes-kes yang dipetik oleh plaintif dan dapatan Mahkamah Tinggi dalam Saman JBHC Amanah seperti yang disahkan oleh Mahkamah Rayuan (dan Mahkamah Persekutuan), kekecewaan yang didakwa oleh defendan sebenarnya disebabkan oleh

diri sendiri dan oleh itu tidak dapat melepaskan defendan daripada kewajipan kontraknya di bawah perjanjian-perjanjian pinjaman tersebut dan kewajipan defendan untuk membayar balik plaintif bagi jumlah yang perlu dibayar dan terhutang di bawah kemudahan-kemudahan tersebut. Oleh itu, mahkamah menjawab soalan 2 secara negatif (lihat perenggan 102–103).

(4) Adalah jelas bahawa defendan tidak dapat mengekalkan tuntutan balasnya berdasarkan perbuatannya yang menyalahi undang-undang dan dia juga tidak boleh bergantung kepada estoppel terhadap plaintif yang timbul daripada perbuatan tersebut yang menyalahi undang-undang. Oleh itu, mahkamah menjawab soalan 3 secara negatif (lihat perenggan 111–112).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
Bank Bumiputra Malaysia Bhd v Esah binti Abdul Ghani [1986] 1 MLJ 16, SC (refd)
CIMB Bank Bhd v Gan Teow Hooi & Ors [2013] 1 MLJ 267, CA (refd)
CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor [2012] 3 MLJ 869, HC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)
Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Clunis v Camden and Islington Health Authority [1998] QB 978, CA (refd)
Committee for Privileges the Ampthill Peerage [1977] AC 547, HL (refd)
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (refd)
Holman et al v Johnson, alias Newland (1775) 1 Cowp 341 (refd)
Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals [2014] 6 MLJ 31, FC (refd)
Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2015] 6 MLJ 612; [2015] 9 CLJ 273, FC (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan [2020] 12 MLJ 54, FC (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)
Pang Mun Chung & Anor v Cheong Huey Charn [2018] 4 MLJ 594, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (distd)

A *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251, HC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14A r 1, O 18 r 19(1)

B

Poh Choo Hoe (Choy Kay Chun with him) (Shook Lin & Bok) for the plaintiff. Dinesh Kanavaji a/l Kanawagi (TA Sivam with him) (Dinesh Kanavaji) for the defendant.

C **Wan Muhammad Amin JC:**

[1] By a notice of application dated 2 October 2020 (encl 14) the plaintiff applied to enter summary judgment against the defendant pursuant to O 14 of the Rules of Court 2012 ('the ROC') ('plaintiff's O 14 application').

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[2] By a notice of application dated 18 December 2020 (encl 27) the plaintiff applied under O 14A r 1 of the ROC and/or the inherent jurisdiction of the Court ('plaintiff's O 14 application') for the defendant's counterclaim dated 28 August 2020 to be determined and specifically for, inter alia, the following reliefs:

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1. that the questions set out in Annexure A hereto be determined by this Honourable Court pursuant to Order 14A of the Rules of Court, 2012;

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2. that consequent upon the determination by this Honourable Court of the said questions set out in Annexure A, and in the event the said questions in Annexure A are determined in favour of the Plaintiff, that the Defendant's counterclaim herein against the Plaintiff be dismissed;'

G **[3]** The questions in Annexure A of encl 27 are as follows:

1. Whether the Defendant's debt obligations to the Plaintiff under the ten (10) Letters of Offer dated 5.5.2010 and two (2) Letters of Offer dated 22.6.2010, and the twelve (12) Facilities Agreements dated 9.2.2011, entered into between the Plaintiff and the Defendant (collectively, 'the Loan Agreements'), are separate and

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independent of the twelve (12) Deeds of Assignment dated 9.2.2011 ('the Deeds of Assignment') in relation to the twelve (12) condominium units at No. 1, Jalan Bukit Keramat, Off Jalan Padang Tembak, 54000 Kuala Lumpur, including the status of the said twelve (12) condominium units?

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a) If affirmative, whether the Defendant is still obligated to repay the Plaintiff, the facilities under the Loan Agreements, even though the said twelve (12) condominium units were ordered to be returned to Linggiu Valley Orang Asli (Jakuns) Trust?

2. Whether the Loan Agreements and/or the Deeds of Assigmnent were frustrated

by the Johor Bahru High Court Order dated 22.12.2016 and the Court of Appeal Order dated 17.1.2019?

3. In the light of the Johor Bahru High Court Order dated 22.12.2016, the Court of Appeal Order dated 17.1.2019 and the Federal Court Order dated 21.8.2020, whether the Defendant can maintain and/or succeed in his counterclaim, which arose from his illegal and/or unlawful acts?

[4] Both encls 14 and 27 (collectively 'the applications') were heard and decided together. It was appropriate to have both the applications heard and decided together as the defendant's defence to the plaintiff's claim is not only contained in his statement of defence but also in his counterclaim. Therefore, in determining whether the plaintiff is entitled to summary judgment the merits of the defence and counterclaim would also be considered.

[5] I allowed both the applications and I set out below the reasons for my decision.

SALIENT BACKGROUND FACTS

Facts pertaining to the plaintiff's claim

[6] At the request of the defendant, by way of ten letters of offer all dated 5 May 2010 and two letters of offer both dated 22 June 2010 ('letters of offer') and 12 facilities agreements all dated 9 February 2011 ('facilities agreements') (the letters of offer and facilities agreements collectively referred to as 'loan agreements') all of which were duly accepted by the defendant, the plaintiff had duly granted to the defendant 12 housing loan facilities ('facilities') to part-finance the defendant's purchase of 12 condominium units at No. 1, Jalan Bukit Keramat, Off Jalan Padang Tembak, 54000 Kuala Lumpur (collectively referred to as 'the 12 properties'). The details of the said RM1,511,003.46 are as follows:

Facility	Housing Loan Account No	Outstanding Amount Due as at 30 November 2019 (RM)
Facility 1	400400004837	127,559.30
Facility 2	400400004824	147,167.38
Facility 3	400400004918	127,674.47
Facility 4	400400004882	94,504.30
Facility 5	400400004921	94,368.67
Facility 6	400400004866	145,108.73
Facility 7	400400004879	127,652.67
Facility 8	400400004840	94,491.94
Facility 9	400400004934	152,113.26

Facility 10	400400004905	120,718.48
Facility 11	400400004853	141,221.69
Facility 12	400400004895	138,422.57
	Total outstanding amount due as at 30 November 2019	1,511,003.46

[7] The facilities were secured by, inter alia, 12 deeds of assignment all dated 9 February 2011 (collectively referred to as 'deeds of assignment') between the defendant and the plaintiff. The plaintiff is yet to enforce the deeds of assignment.

[8] Pursuant to the terms of the agreements, the defendant agreed with the plaintiff, inter alia, as follows:

(a) that the defendant shall repay the facilities by way of monthly instalments for a tenure of 240 months;

(b) notwithstanding the aforesaid, the facilities shall be repayable forthwith upon demand by the plaintiff;

(c) that the defendant shall pay interest at the rate of the plaintiffs base lending rate minus 2%pa on daily rests. The plaintiffs base lending rate was subject to change from time to time; and

(d) that upon default in repayment by the defendant, the defendant shall pay to the plaintiff interest at the prescribed rate together with default interest at such rate over and above the prescribed rate as may be stipulated by the plaintiff or at such other rate as the plaintiff may at any time stipulate.

[9] The plaintiff had released the sums under the facilities and the defendant had utilised the facilities.

[10] The defendant defaulted in his monthly instalment payments under the facilities to the plaintiff on their due dates, despite reminders from the plaintiff.

[11] In this regard, the plaintiff had, through its solicitors issued letters dated 25 February 2020 to the defendant, declaring that events of default had occurred, the facilities had been terminated and all outstanding balances under the facilities became immediately due and payable to the plaintiff.

[12] Despite the said letters of demand dated 25 February 2020, the defendant had failed, neglected and/or refused to settle the outstanding sums due to the plaintiff under the facilities.

Facts pertaining to the defendant's defence and counterclaim

[13] The defendant's purchase of the 12 properties that were part-financed by the plaintiff is a part of a total of 30 properties that were purchased by the defendant ('the 30 properties').

[14] The defendant obtained loans for the purchase of the said 30 properties from three banks, the brief details of which are as follows:

(a) Malayan Banking Bhd ('Malayan Banking') — 16 properties;

(b) the plaintiff (Affin Bank Bhd) — 12 properties; and

(c) CIMB Bank Bhd ('CIMB Bank') – two properties.

[15] Malayan Banking provided loans for 16 properties while the plaintiff provided 12 loans and CIMB Bank provided two loans.

[16] The 30 properties were originally owned by Datuk Bandar Kuala Lumpur ('DBKL').

[17] Through a series of transactions and dealings, the facts of which are not material to the applications, the 30 properties were assigned by DBKL to one Idaman Spectra Sdn Bhd ('Idaman Spectra'), a company that had purchased the 30 properties.

[18] Idaman Spectra then sold the 30 properties to the defendant.

[19] The plaintiff released the loan sum under the facilities to Idaman Spectra in respect of the defendant's purchase of the 12 properties.

[20] Sometime in September, 2011, an entity known as Linggiu Valley Orang Asli (Jakuns) Trust ('the Trust') which was managed by a receiver and manager commenced a suit in the Johore Bahru High Court, the particulars of which are as follows:

DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
GUAMAN NO. 23NCVC-106-07/2012
(dahulunya dikenali sebagai Guaman. MTKL - 22NCC–1512-09/2011)

ANTARA

Linggiu Valley Orang Asli (Jakuns) Trust
(Bertindak melalui Penerima dan Pengurus
yang dilantik Ng Eng Kiat (No. K/P :
531016-10-5919)) ... PLAINTIF

DAN

1. KU AZHAR BIN KU ABDUL RAZAK
(No. K/P : 700305-02-5493)
2. DINESH KANAVAJI A/L KANAWAGI
(No. K/P : 781121-07-5119)
3. KANAWAGI A/L SEPERUMANIAM
(No. K/P : 450112-07-5241)
4. TETUAN KHANA & CO (didakwa sebagai firma)
5. RIZA MAKHZAN ARI FIN
(No. K/P: 730201-03-5221)
(Mengamal sebagai Peguambela & Peguamcara di bawah nama dan gelaran Tetuan Sharifah & Associates)
6. PUTERI INTAN NURUL ARZIAN BT ABDUL AZIZ
(Mengamal sebagai Peguambela & Peguamcara di bawah nama dan gelaran Tetuan Sharifah & Associates)
7. MAMPU JAYA SDN BHD (Dalam Penggulungan)

...

(No. Syarikat: 128556-D) DEFENDAN-DEFENDAN

('Trust's JBHC Suit')

[21] The Trust's JBHC Suit was against, amongst others, the defendant for, inter alia, a declaration that the trust was the rightful owner of certain properties including the 30 properties (which includes the 12 properties).

[22] The Trust's JBHC Suit was allowed and, inter alia, the following orders were made on 22 December 2016 by the High Court:

> 2. Bahawa *Plaintif diisytiharkan sebagai tuan punya* dan/atau berhak kepada segala kepentingan, manfaat yang diterima atau berbangkit daripada *30 Unit Tambahan Apartmen di Lanai Gurney Heights Condominium, No. 1, Jalan Padang Tembak, Off Jalan Bukit Keramat, 50450 Kuala Lumpur*.
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> ...
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> 4. Satu *deklarasi* bahawa *Defendan-Defendan Pertama sehingga Ke-7* telah *secara tidak jujur membantu Defendan Pertama* menghasilkan keuntungan rahsia, komisyen, insentif, aset dan manfaat lain yang tak sah yang timbul dari milikan dan kawalan yang tidak sah dan salah mereka atas 27 Unit dan *30 Unit Tambahan* tersebut.
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> 5. Satu deklarasi bahawa *Defendan-Defendan Pertama sehingga Ke-5* adalah *pemegang amanah konstruktif* bagi Plaintif berkenaan dengan semua wang yang

diterima mereka melalui keuntungan rahsia, komisyen, insentif, aset dan manfaat lain yang tak sah yang timbul dari milikan dan kawalan yang tidak sah dan salah mereka atas 27 Unit dan *30 Unit Tambahan* tersebut.

6. Satu deklarasi bahawa *Defendan-Defendan Pertama sehingga Ke-7 telah memungkiri kewajipan-kewajipan fidusiari, kontrak dan amanah konstruktif* yang mereka masing-masing mempunyai terhadap Amanah itu dan/atau bahawa Defendan-Defendan adalah penyerta-penyerta bersama dan telah secara tidak jujur membantu satu sama yang lain dalam melakukan kemungkiran kewajipan-kewajipan itu.

7. Satu deklarasi bahawa *Defendan-Defendan Pertama sehingga Ke-7 telah melakukan suatu fraud dan berkomplot* antara satu sama lain dengan maksud utama untuk membawa kerugian kepada Plaintif dan/atau bahawa Defendan-Defendan tersebut adalah penyerta-penyerta bersama dan telah secara tidak jujur membantu satu sama lain dalam melakukan fraud dan komplot itu terhadap Plaintif.

Perintah-Perintah Injunksi

8. Bahawa *Defendan-Defendan Pertama sehingga Ke-7* yang dinamakan di sini samada secara sendiri atau ejen atau pengkhidmat mereka atau mana-mana dari mereka atau sebaliknya dalam apa jua cara *dilarang* dan suatu injunksi dikeluarkan untuk melarang mereka dari *menjual, menyerah, membebankan melalui cagaran atau sebaliknya, mencampur tangan dengan penyewaan-penyewaan masa kini, menggadai, menggadai-janji, menyerahhak, menyandarkan (pledging), memindahmilik, berurusan, menghabiskan, melupuskan, menyingkirkan (removing), menyembunyikan, merendahkan nilai atau membinasakan* dalam apa cara jua 27 Unit dan *30 Unit Tambahan* tersebut atau wang-wang yang diperolehi darinya samada Unit-unit sedemikian berada dalam nama mereka secara tunggal (solely) atau dipegang bersama dengan atau oleh orang-orang lain termasuk nominee-nominee mereka atau bagi pihak mereka dan/atau atas amanah bagi pihak mereka.

9. Bahawa *Defendan-Defendan Pertama sehingga Ke-7* atau mana-mana dari mereka yang diserah dengan perintah yang akan dibuat di sini akan dengan serta-merta dan *bersetuju melakukan semua tindakan* dan perkara yang perlu *untuk membolehkan Plaintif mendapatkan milikan* dan kawalan ke atas 27 Unit dan *30 Unit Tambahan* itu atau sebarang wang atau aset lain yang telah diperolehi atau dibeli dengan penggunaan dan manfaat dana Plaintif.

Perlaksanaan Spesifik

10. Bahawa *Defendan-Defendan Pertama sehingga Ke-5* dengan serta-merta memajukan kepada Plaintif semua dokumen-dokumen asal yang *membuktikan pembelian 30 Unit Tambahan tersebut termasuk Suratikatan Penyerahhakkan (melalui Pemindahmilik)* untuk yang sama masing-masing, yang telah disempurnakan dengan sewajarnya dan dengan setem duti ad valorem dibayar atasnya.

11. Bahawa *Defendan-Defendan Pertama sehingga Ke-5 menyerahkan kawalan* dan milikan 27 Unit dan *30 Unit Tambahan* tersebut dan pengurusannya kepada Plaintif bersama dengan semua dokumen sokongan relevan dan yang diperakui yang membuktikan pengurusan yang sama dan sekiranya dokumen sedemikian tidak di dalam milikan mereka, mereka diperintahkan mendapatkan salinan yang

A sama daripada orang-orang relevan dan mematuhi perintah yang dibuat di sini.

12. Bahawa *Defendan-Defendan Pertama sehingga Ke-5 dan Defendan Ke-8 memastikan bahawa suratan hakmilik strata* bagi 27 Unit dan *30 Unit Tambahan* tersebut dipohon dan bila dikeluarkan oleh Pihak Berkuasa Tanah, *diserah kepada Plaintif* bersama dengan borang pindahmilik pejabat tanah yang telahpun
B ditandatangani dengan sempurna memihak Plaintif bagi 27 Unit dan 30 Unit Tambahan tersebut. (Emphasis added.)

[23] The defendant appealed against the High Court's decision in the Trust's JBHC Suit to the Court of Appeal ('defendant's appeal').
C

[24] The Trust, through its receiver and manager, threatened committal proceeding against the defendant and this resulted in the defendant handing over the 12 properties to the said receiver and manager.

D

[25] After being notified of the decision in the Trust's JBHC Suit, on 7 August 2018 the plaintiff filed an action vide Kuala Lumpur High Court Suit No WA-22NCC-340–08 of 2018 against the defendant, the Trust (acting through its receiver and manager) and the Director General of Insolvency as
E the Liquidator of Mampu Jaya Sdn Bhd (in liquidation) ('plaintiff's KLHC Suit').

[26] The reliefs sought by the plaintiff in the plaintiff's KLHC Suit are, inter alia, as follows:
F

(a) Satu Deklarasi *bahawa Plaintif adalah Penerima Penyerahhak (Assignee) yang sah kepada 12 unit-unit Hartanah* yang dinyatakan berikut;

(b) Satu Perintah bahawa *hak dan kepentingan pihak Plaintif* sebagai Pemegang Penyerahhak ke atas *dua belas (12) unit-unit hartanah* tersebut
G adalah *terpelihara* walaupun satu Penghakiman Mahkamah bertarikh 22,12.2016 telah diberikan kepada Defendan Kedua;

(c) Suatu Perintah bahawa *Defendan Pertama dan/atau Defendan Kedua dan/atau Defendan Ketiga* iaitu mana-mana pihak yang memegang dan menyimpan *salinan asal Geran Hakmilik Individu* unit-unit Hartanah
H tersebut untuk *menyerahkannya kepada Plaintif* daiam tempoh Tujuh (7) hari selepas Perintah Mahkamah ini di sampaikan;

(d) Satu Perintah bahawa *hak dan kepentingan Plaintif* sebagai Penerimahak (Assignee) atas unit-unit Hartanah tersebut *disempurnakan melalui Pendaftaran gadaian* atas nama Plaintif ke dalam Geran Hakmilik
I Individual unit-unit Hartanah tersebut;

(e) Secara *alternatif* kepada perenggan (b) dan (c) diatas adalah supaya *Defendan Pertama atau Defendan Kedua menjelaskan segala keberhutangan* Defendan Pertama kepada Plaintif dan menebus unit-unit hartanah tersebut daripada pihak Plaintif. (Emphasis added.)

[27] On 17 January 2019 the Court of Appeal dismissed the defendant's appeal and affirmed the decision of the High Court in the Trust's JBHC Suit as well as the orders that were made by the High Court.

[28] The defendant then filed an application for leave to appeal to the Federal Court against the said decision of the Court of Appeal ('defendant's leave application').

[29] According to the plaintiff, on 20 March 2019 the plaintiff's KLHC Suit was struck out with liberty to file afresh as the plaintiff did not obtain leave of the court before commencing proceedings against the receiver and manager of the Trust who was an officer of the court. However, the defendant claims the plaintiff's KLHC Suit was dismissed with no provision for liberty to file afresh.

[30] After the plaintiff's KLHC Suit was struck out, the plaintiff's then solicitors, Messrs. Sidek Teoh Wong & Dennis, vide their letter dated 25 September 2019, wrote to the Trust's then solicitors, Messrs Rosley Zechariah, to enquire with regard to the Trust's position in relation to the 12 properties that had been ordered by the courts to be transferred to the Trust.

[31] On 25 February 2020, the plaintiff, through its solicitors, issued letters to the defendant, declaring that events of default had occurred, the facilities had been terminated, and all outstanding balances under the facilities were immediately due and payable by the defendant to the plaintiff.

[32] On 21 August 2020 the Federal Court dismissed the defendant's leave application. It was reported that the Honourable Chief Justice made the following statement when the defendant's leave application was dismissed:

> The High Court judgement was well reasoned and was upheld by the Court of Appeal.

[33] On 28 August 2020 the defendant filed its defence and counterclaim in this action.

[34] The defendant, inter alia, admits to have ceased repayment of the facilities by reason that the plaintiff failed to secure the 12 properties (para 14 of the defence and counterclaim).

THE PLAINTIFF'S CLAIM AND O 14 APPLICATION

[35] The plaintiff's claim against the defendant is straight forward and it arises from the default in repayment of the facilities by the defendant.

[36] The plaintiff's claim is based on, inter alia, the following facts:

(a) there is no dispute as to the loan agreements, facilities or deeds of assignment by the defendant (though the defendant sought to interpret the terms of some of these documents in his favour);

(b) the defendant did not deny that he had taken the facilities or that the sums thereunder had been disbursed; and

(c) the defendant admitted that pursuant to loan agreements the defendant had paid the monthly loan payments for the 12 properties until September, 2019 amounting to RM1,401,504 (paras 13 and 59 of the defence and counterclaim).

[37] To proof, inter alia, the correctness of the amount owed by the defendant to the plaintiff, the plaintiff had exhibited its certificate of indebtedness pursuant to section 15.15 of the loan agreements which states as follows:

> It is hereby agreed that any admission of acknowledgement in writing by the Borrower, or any Security Party, or by any person authorised on their behalves of a judgment (by default or otherwise obtained against any of them) or *a statement of account in writing showing the Indebtedness of the Borrower*, or any Security Party, *which is duly certified by an authorised officer or agent of the Bank*, or computer generated invoices issued by the Bank which do not require signatures as to the amount of such balance and liabilities incurred or due to the Bank or as to the rate of interest or amount of interest payable shall be binding and *conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of Indebtedness in a court of law, save for manifest error*. (Emphasis added.)

[38] In addition to the certificate of indebtedness, the plaintiff also produced and exhibited detailed statements of account in respect of the facilities showing the total outstanding amount due and owing by the defendant as at 30 November 2019, amounting to RM1,511,003.46.

[39] It was submitted by learned counsel for the plaintiff, Mr Poh Choo Ho, that the certificate of indebtedness is conclusive proof of the outstanding amounts due under the facilities and the following cases were cited in support:

(a) *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 at p 691 where the Federal Court held:

> [11] ... A certificate of indebtedness operates in the field of adjectival law. *It excuses the plaintiff from adducing proof of debt*. Such a certificate *shifts the burden onto the defendant to disprove the amount claim*. (Emphasis added.)

(b) *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 at p 284 where the Federal Court held:

> In the present case the guaran-tee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.' *It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate*: see *Dobbs v National Bank of Australasia Ltd* (6); *Bache & Co v Banque Vernes* (7). (Emphasis added.)

(c) *CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor* [2012] 3 MLJ 869 at p 882, where the High Court held:

> [34] The amount claimed in this application is RM54,442,744.08 as at 18 May 2010. The plaintiff has furnished two documentary proofs ie the statement of account and the certificate of indebtedness to substantiate the said claim. *It is a settled law that this court should give effect to such documents which have been agreed by the parties to be conclusive evidence on the defendants' indebtedness under the second BBA facility. Since there was no evidence to the contrary before this court to cast doubt on the accuracy of the certificate, this court ruled that the issue raised is with no merit. The legal position of the certificate of indebtedness is well settled in Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544. (Emphasis added.)

[40] The plaintiff has also satisfied the preliminary requirements of an O 14 of the ROC application as set out by the Federal Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 which was later referred to again by the Federal Court in *Cempaka* as follows:

> [5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O 14 application. With respect, that cannot be the correct proposition of law. In an application under O 14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36). Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300*, the Federal Court has stated thus:*
>
> > We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements are:
> >
> > (i) the defendant must have entered an appearance;

A (ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.

B ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. *This burden then shifts to the defendant to satisfy the court why judgment should not be given against him*. (Emphasis added.)

C **[41]** Therefore, based on the above authorities regarding an O 14 ROC application read together with the authorities in respect of the conclusiveness of the certificate of indebtedness and there being no dispute in respect of, inter alia, the fact that the defendant had ulitised the facilities and that the sums thereunder were disbursed, the plaintiff has made out a case for summary D judgment under O 14 ROC and the only issue is whether the defendant has a defence on the merits or otherwise whether there is some other reason for a trial.

E **[42]** For this, I will now turn to the defendant's defence to the plaintiff's claim.

THE DEFENDANT'S DEFENCE AND COUNTERCLAIM

F **[43]** The crux of the defendant's defence to the plaintiff's claim is contained in the following paragraphs of the defence and counterclaim:

53. *By virtue of the High Court orders* given in *Johore Bahru High Court Suit No. 23NCVC-106-07/2012* and affirmed by the Court of Appeal, the Agreements and the Assignments entered between the plaintiff and the defendant were *frustrated and* G *null and void*.

54. By reasons of the matter aforesaid above, the issues in this action are res judicata and the Plaintiff is *estopped from raising the same issues*.

55. The Defendant avers that the Plaintiff's action herein is *an abuse of the Court* H *process* and/or the *Plaintiff is estopped from filing this action as the Plaintiff had filed Kuala Lumpur High Court Suit No. WA-222NCC-340-08/2018 for the same relief against the Defendant* and this action was dismissed without liberty to file afresh and therefore the issues in this action are res judicate and the Plaintiff is estopped from raising the same issues. (Emphasis added.)

I **[44]** Therefore, the defendant's defence can be summarised as follows:

(a) the plaintiff's claim is frustrated and is null and void because of the decisions of the High Court and Court of Appeal (which was also affirmed by the Federal Court) in the Trust's JBHC Suit which

essentially declared the Trust as the rightful owner of the 30 properties which includes the 12 properties being the subject matter of this action;

(b) the issues in the plaintiff's action herein are res judicata and the plaintiff is estopped from raising the same issues which were raised in the Trust's JBHC Suit; and

(c) the plaintiff is further estopped from filing this action as the plaintiff had sought the same relief against the defendant in the plaintiff's KLHC Suit and thus the issues in this action are also res judicata and the plaintiff is estopped from raising the same issue here.

[45] The defendant's counterclaim is premised upon the above defence or arguments and this can be seen from the following paragraphs of the counterclaim:

> 60. However, *the plaintiff had failed, neglected and/or refused to take any action to protect their rights, title and interest in the said properties* thereby *refusing* the defendant the *right to redeem* the said *12 properties*.
>
> 61. *Further by the decision of the Johore Bahru High Court given on 22.12.2016 and affirmed by the Court of Appeal on 17.01.2019*, the aforesaid Agreements and Assignments entered between the plaintiff and the defendant *were frustrated*, the effect of which *the plaintiff has to now return all monies paid by the defendant* to the plaintiff. (Emphasis added.)

[46] The reliefs sought by the defendant in his counterclaim are essentially as follows:

(1) For an order that the *12 Facilities Agreement dated 9.02.2011, and the 12 Deeds of Assignment* dated 9.02.2011 entered between the plaintiff and the Defendant were *frustrated as a result the Order dated 22.12.2016* given in Johore Bahru High Court Suit No. 23NCVCc-106-07/2012 and confirmed by the Court of Appeal on 17.01.2019;

(2) For an Order that the *plaintiff pays the Defendant the sum of RM1,401,504.00* being the total monthly loan payments for the said 12 properties paid by the Defendant to the plaintiff from 9.02.2011 until September, 2019;

(3) Damages suffered by the Defendant in the lost of the 12 Properties be paid by the plaintiff; (Emphasis added.)

[47] Thus, the crux of the defendant's defence to the plaintiff's claim and the defendant's counterclaim against the plaintiff is premised upon the defendant's allegation that the plaintiff had failed to protect the plaintiff's rights, title and interest in the 12 properties ('plaintiff's rights over the 12 properties'). This is essentially the main issue in the defence and counterclaim.

[48] It is therefore clear that the defendant's defence to the plaintiff's claim forms the basis for his counterclaim and this means that if the defendant fails in his defence, so too would his counterclaim fail.

[49] This is the reason why it is apt to hear and determine both the plaintiff's O 14 application and the plaintiff's O 14A application together as they are so interconnected and intertwined that the decision of one would inevitably affect the other.

THE PLAINTIFF'S O 14A APPLICATION

[50] Whilst it is common for a party wanting to strike out a pleading to make an application under an O 18 r 19(1) ROC, however, here the plaintiff decided to file an application under O 14A ROC instead. for the counterclaim to be determined by this court.

[51] Arguably an O 14A ROC application is less onerous than an O 18 r 19(1) ROC application and can even be considered a form of a 'surgical strike' application as it is more 'precise' in nature. This is because in an O 14A ROC application the applicant would pose specific questions for the court to determine or answer.

[52] The main common feature of an O 18 r 19(1) ROC application and O 14 ROC application is that there must not be a material dispute as to facts.

[53] On the other hand, one of the one major differences between an O 18 r 19(1) ROC application and O 14A ROC application is in the former the successful applicant will get the matter or pleading struck out while the later could lead to a judgment being entered or the matter dismissed, as the case may be.

[54] Returning to the plaintiff's O 14A application, O 14A ROC provides as follows:

> Determination of questions of law or construction (O 14A r 1)
>
> (1) The Court may, upon the application of a party or of its own motion *determine any question of law or construction of any document* arising in any cause or matter at any stage of the proceedings *where it appears to the Court* that —
>
> (a) *such question is suitable for determination without the full trial of the action*; and
>
> (b) *such determination will finally determine the entire cause or matter or any claim or issue therein*.
>
> (2) On such determination *the Court may dismiss the cause or matter or make such order or judgment* as it thinks just.

The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question. (Emphasis added.)

[55] In order to determine whether a particular question or issue is suitable to be determined under O 14A ROC all the necessary material facts relating to the subject matter of the question or issue must have been duly proved or admitted or should not have been disputed. This has been decided in the following high authorities:

(a) *Lembaga Pembangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors* [2015] 6 MLJ 612; [2015] 9 CLJ 273, where the Federal Court held:

> [38] We begin by briefly discussing the mode of action, which alludes to O 14A of the Rules. This Order enables the High Court to determine any question of law or construction of documents arising in any cause or matter at any stage of the proceedings, where to the court such questions are suitable for determination without going through a full trial, and that determination will dispose of the entire matter. *In order to do that it is crucial that all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted*. In a gist there are *no substantial factual disputes left to be resolved*. In The Malaysian High Court Practice 2001 Desk Edition at para. 14A. 1.3 the writers authored:
>
> > The question of law or construction must be suitable to be determined without the full trial of the action. *The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted*. This postulates that there is no dispute or no further dispute exists as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action. (Emphasis added.)

(b) *Kerajaan Negeri Kelantan v Petroliam Nasional Bhd and other appeals* [2014] 6 MLJ 31, where the Federal Court held:

> [38] The plaintiff's contention with regard to its rights over petroleum won and saved in the continental shelf off its coast in this case is based on the Kelantan petroleum agreement and the Kelantan grant which were entered into between the plaintiff and Petronas pursuant to the provisions of the PDA. Clearly, this issue is a question of law which can be resolved by reference and *interpretation of the relevant legislations* and *contractual documentations without having to go for a full trial of the action*. It is trite that *where the question of construction is a dominant feature of a case, the court should proceed to determine that issue. It follows that the whole case does not have to be disposed of but it is sufficient if substantial matters can be disposed of* (see *Korso Finance Establishment Anstalt v John Wedge* (unreported, 15 Feb 1994, CA Transcript

A No 14/387)). Further, we also find that the pleadings have made reference to various legislations which in our view, are comprehensive and sufficient for the *determination of the legal questions* involved in this case, *to the exclusion of the oral evidence of witnesses*. (Emphasis added.)

B **[56]** I am of the considered view that in the present case in order to effectively determine the suitability of the questions in Annexure A of the plaintiff's O 14A application, each question must be examined together with the arguments raised by the defendant that the questions are not suitable to be determined by way of an O 14A ROC application as well as his arguments that C in any event the answers to the questions do not favour the plaintiff. This will effectively determine whether the questions would truly dispose of the defendant's counterclaim.

D **[57]** Therefore, this is an all-encompassing exercise in that the suitability of the questions for an O 14A ROC application is considered together with the answers to those questions and hence the merits of the application would also be determined in the process.

E QUESTION 1: WHETHER THE LOAN AGREEMENTS ARE SEPARATE AND INDEPENDENT OF THE DEEDS OF ASSIGNMENT

[58] It is submitted on behalf of the plaintiff that it is settled law that:

F (a) the defendant's repayment obligations under the loan agreements are separate and independent of the status of the 12 properties, including the deeds of assignment; and

(b) in this regard, despite the 12 properties being ordered to be returned to the Trust, the defendant is still obligated to repay the facilities under the G loan agreements.

[59] In support of his argument, learned counsel for the plaintiff relied and submitted on the following cases:

H (a) *CIMB Bank Bhd v Gan Teow Hooi & Ors* [2013] 1 MLJ 267, where the Court of Appeal, in allowing the appeal against the dismissal by the High Court of the appellant's O 14A application, held:

> [37] *Even if the deed of assignment is invalid (if the sale and purchase agreement and construction agreement is illegal), the loan agreement is however,* ***distinct and separate from the deed of assignment***. This principle of severability is I applicable as was approved in authorities such as *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75.
>
> [38] Over and above this, *the appellant has the right to initiate civil action*

(action in personam) against the respondent under the loan agreement to recover the debt due and owing by the respondents.

[39] *The contractual liability of the respondents as borrowers under the loan agreement cannot be discharged with impunity*, merely because the contractor had no licence as a housing developer. (Emphasis added.)

(b) *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 412 where the Federal Court applied the principle of severability and held that the loan agreement was distinct from the charge and that whilst the charge had become void the loan agreement was still valid and enforceable. In other words, the illegality of the charge did not have an impact on the validity and enforceability of the loan agreement. The Federal Court held as follows:

... In any event, *the loan agreement as distinct from the third party charge is perfectly valid and enforceable by law. Applying the principle of severability, the effect of the illegal charge was merely to downgrade the borrowing by Ismail from a secured to an unsecured loan* ... (Emphasis added.)

[60] The defendant argued that this is not a question of law but a question of fact because the plaintiff is relying on the loan agreements and the deeds of assignment which all refer and make reference to the 12 properties.

[61] The defendant further argued that the material terms of all the loan agreements were regarding the purchase of the 12 properties. That if the 12 properties were no longer available due to the 'unforeseen circumstances' the loan agreements and deeds of assignment cannot stand as the main substratum purpose of these agreements has been invalidated.

[62] The 'unforeseen circumstances' referred to by the defendant are what he pleaded as 'intervening events' in his defence and counterclaim which are namely the Trust's JBHC Suit and decisions by the High Court, Court of Appeal and Federal Court in respect of the said suit and subsequent events connected thereto.

[63] Before dealing further into the above arguments by the plaintiff and the defendant, I must highlight that all three questions in the plaintiff's O 14A application are actually so interconnected that the same or similar arguments will be repeated and applied for each question by both parties. The three questions can even be considered as one big question.

[64] They all come down to one main issue that is whether the loan agreements and/or deeds of assignment are frustrated by the Trust's JBHC Suit

A and specifically the Johor Bahru High Court Order dated 22 December 2016 and the Court of Appeal Order dated 17 January 2019 (which was upheld by the Federal Court).

B **[65]** This in turn goes into the what was determined and held by the High Court and Court of Appeal in the Trust's JBHC Suit. This, to my mind, is the main issue. Once that has been determined then the rest involve the application of legal principles which as far the questions in the plaintiff's O 14 application are concerned are quite trite. This can be seen when dealing with those questions.

C

[66] What the plaintiff has done is that it had broken the questions in the plaintiff's O 14A application into three parts, *questions 1* and *3* being substantially *legal questions* while *question 2* being more of a question of *interpretation* or *construction*.

D

[67] I am of the considered view that what needs to be determined is how and what impact the decisions of the High Court and Court of Appeal in respect of the Trust's JBHC Suit has on the present action, in particular the counterclaim.

E

[68] It then boils down to whether viva voce evidence is required and whether the impact of the decisions of the High Court and Court of Appeal in the respect of the Trust's JBHC Suit are actually in favour of the plaintiff's argument or the defendant's.

F

[69] Hence, the factual part of the plaintiff's O 14A application will be dealt in question 2.

G

[70] Reverting back to question 1, the 12 properties for which the deeds of assignment were executed were a form of security for the facilities granted.

H **[71]** The defendant relied on the case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 (FC) and, inter alia, the following passage:

> [42] ... It is true that nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment after which, the borrower 'shall be entitled ... to obtain a discharge and release of the said lot from the Lender, (see cl 27 of the said loan agreement). *Thus we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right title and interest' in the said land pending the exercise of such contractual right to redeem* ... (Emphasis added.)

I

[72] The defendant argued that all the loan agreements are deemed to be security documents/transaction whereby the loans are given by the plaintiff with a provision for repayment after which, the borrower 'shall be entitled' to obtain a discharge and release of the 12 properties from the plaintiff.

[73] In this regard, learned counsel for the plaintiff's submitted in response that the passages in the case of *Samuel Naik* cited by the defendant did not concern a borrower's repayment obligations in relation to a discharge of assigned properties. On the other hand, the main principle expounded by those passages was in relation to the effect of an absolute assignment, where the court held that the deeds of assignment therein were equitable mortgages (even though the word 'mortgage' had not been used) and therefore the bank became an equitable mortgagee of the said properties. And in view of the loan agreements being defaulted by the borrower, the bank was entitled to invoke the deeds of assignment to deal with all the rights and interest in relation to the said properties absolutely and beneficially. As such the case of *Samuel Naik* is not relevant or of assistance to the defendant.

[74] In agree with the above submissions of learned counsel for the plaintiff.

The passages referred to by the defendant in the *Samuel Naik*'s case basically sets out the legal position of an assignment or more so an absolute assignment treated as security for a loan. *Samuel Naik* did *not* deal with the question that the 'loss' of the (assigned) security entitled the borrower not to repay the loan and neither was it held that the borrower could avoid paying the loan in the event the (assigned) security was 'lost' or extinguished.

[75] In any event, the defendant did *not* at any time request from the plaintiff a redemption statement for the purposes of redeeming the 12 properties from the plaintiff which the defendant could not do in any event due to the High Court order in the Trust's JBHC Suit. Therefore, there is and can be no issue of the defendant redeeming the 12 properties.

[76] It is not in dispute that the loan agreements refer to the 12 properties and the deeds of assignment and that they are part and parcel of the loan agreements as argued by the defendant. However, this does not mean that loan agreements are not separate and independent of the deeds of assignment.

[77] Also, by section 15.18 of the loan agreements (under 'Independent Payment Obligations'), the defendant had expressly agreed that the defendant's repayment obligations to the plaintiff under the loan agreements shall constitute separate and independent obligations.

[78] In this regard, it is trite the plaintiff has the exclusive right to pursue both legal action against defendant as borrower to recover monies due under the facilities and/or pursue its rights to recover monies through the securities given and, in this case, the 12 properties. It was held in the Federal Court case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 as follows:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. *And he may pursue all of these courses simultaneously, contemporaneously or successively*. See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842. (Emphasis added.)

[79] The Federal Court in *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478 referred to *Low Lee Lian* and reiterated the above principle from the said case.

[80] Further, in *Bank Bumiputra Malaysia Bhd v Esah binti Abdul Ghani* [1986] 1 MLJ 16, the Supreme Court considered the exercise of the banks' rights over securities held by the bank as well as the bank's right to sue the borrower (and guarantor) to recover monies owed under the loan given. The Supreme Court held as follows:

> The case of *Duncan, Fox & Co v North and South Wales Bank* (3) involved certain bills discounted by the bank and indorsed by Duncan, Fox & Co and accepted by Radford & Co Before the bills became due Radford & Co stopped payment. The bills were dishonoured, and Duncan, Fox & Co. became liable to the bank. The bank held certain securities from Radford & Co. It was held that the bank should hand over the securities to Duncan, Fox & Co on payment by them of the balance remaining due to the bank. On this point, *Paget on Banking* (8th Ed) p 618 has this to say:
>
> > ... The real question was whether Duncan, Fox & Co as indorsers were entitled to the same rights as sureties on paying the bills; and, save for the words of Lord Watson quoted above, *there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor*.
>
> On the contrary, *the right to sue the guarantor without resorting to the securities is clearly recognised* by Lord Selborne, and by ... Lord Blackbum, in the Scottish case of Ewart n Lattas' Lord Westbury, C says:
>
> > *Until the debtor has discharged himself of his liability*, until he has fulfilled his own contract, *he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor*. The creditor must be left in possession the whole of the remedies which the original contract gave him, and *he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation*

> *upon the course of legal action given by* him by his contract by any person who is still his debtor, *except upon the terms of that debt being completely satisfied*.

Further on he says:

> The same principle prevails also in the law of England, that if a debt be due from A and B be the surety, B has no right in respect of that debt as against the creditor *unless he undertakes to pay and actually does discharge it*. (Emphasis added.)

[81] Hence the plaintiff is entitled to pursue the recovery of the monies due under the facilities against the defendant and it can, if it chooses, also exercise its rights over any security (or even over any guarantee) given.

[82] Based on the cases cited by the plaintiff, namely *Gan Teow Hooi*, *Badiaddin* and *Low Lee Lian* read together with *Chan Boi Loi* and *Esah binti Abdul Ghani*, it is clear that the loan agreements must be treated separately from the deeds of assignment. The 'loss' of that the 12 properties (the security) does *not* mean that the defendant is released from his contractual obligations under the loan agreements.

[83] At this juncture, it must made highlighted that issue of the 'loss' of the 12 properties or how they came to be declared as belonging to the Trust by the High Court in the Trust's JBHC Suit is a matter which will be dealt in question 2.

[84] However, for the purpose of this question 1, the defendant's argument that the plaintiff's failure to protect the plaintiff's rights over the 12 properties (as alleged by the defendant) entitles the defendant to stop paying for the facilities granted and further entitle him to claim for the return of all the payments he had previously made is devoid of merits.

[85] It is quite clear from the passage taken from *Paget on Banking* (8th Ed), as quoted by the Supreme Court in *Esah binti Abdul Ghani* that there is nothing to 'support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor'. Whilst the passage in *Esah binti Abdul Ghani* refers to a surety (under a guarantee) there is no reason it cannot also apply to a principal borrower.

[86] Further, it is also clear that *until and unless* the defendant, as the borrower has, completely settled his debts to the plaintiff under the facilities, 'he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor', that is the plaintiff (*Esah binti Abdul Ghani*). This negates the defendant's earlier mentioned argument regarding his right to redeem the 12 properties which he cannot do *until and unless* he has completely satisfied the sums owed to the plaintiff under the facilities.

[87] However, it is observed that even if the defendant settles the sums owed under the facilities it is unlikely he will be able to redeem the 12 properties which have been declared as belonging to the Trust.

[88] What this simply means is that the borrowing by the defendant is 'downgraded' from a 'secured to an unsecured loan' (*Badiaddin*). The loan or facilities, however, remain intact and enforceable.

[89] The defendant cannot use the issue of the 'loss' of the 12 properties to escape or avoid his contractual obligations to the plaintiff under the loan agreements. It would be utterly unfair for the defendant to escape his obligations when the plaintiff had disbursed sums under the facilities which were based on the defendant's request.

[90] In the circumstances, I answered question 1 in the *affirmative*. Suffice to say at this point that the plaintiff did *not* cause the 'loss' of the 12 properties or was in some way involved in the 12 properties being declared as belonging to the Trust. This issue comes under question 2 and question 3 which I will deal with in greater detail below.

QUESTION 2: WHETHER THE LOAN AGREEMENTS AND/OR THE DEEDS OF ASSIGMNENT WERE FRUSTRATED BY THE JOHOR BAHRU HIGH COURT ORDER DATED 22 DECEMBER 2016 AND THE COURT OF APPEAL ORDER DATED 17 JANUARY 2019

[91] On this question 2 of the plaintiff's O 14A application, learned counsel for the plaintiff submitted that the defendant is precluded and/or estopped from raising 'frustration' for the following reasons:

(a) in September 2011, the Trust, via its receiver and manager, commenced the Trust's JBHC Suit claiming, inter alia, for recovery of, inter alia, the 12 properties from the defendant;

(b) in December 2016, the High Court in the Trust's JBHC Suit delivered its decision in favour of the Trust. The High Court found, inter alia, that the defendant was misusing monies of the Trust to purchase, amongst others, the 12 properties and had breached his duty to the Trust. In this regard, the High Court declared, inter alia, the Trust as the owner of the 12 properties and accordingly ordered for them to be returned to the Trust (order of the High Court dated 22 December 2016 and the grounds of judgment of the High Court dated 21 October 2017);

(c) the High Court's decision was upheld by the Court of Appeal and the Federal Court (Court of Appeal Order dated 17 January 2019, the grounds of judgment of the Court of Appeal dated 22 January 2019 and

the Federal Court Order dated 21 August 2020 the news articles reporting on the foregoing (referred earlier in para 32 above);

(d) in the light of the aforesaid Court Orders, it is indisputable that the reason for the Court to order the 12 properties to be returned to the Trust was due to the fact that trust monies were misused by the defendant to purchase the 12 properties (paras 158–159, 161–162 and 166 of the grounds of judgment of the Court of Appeal dated 22 January 2019); and

(e) in this regard, since the defendant himself was the cause for the 12 properties to be returned to the Trust, the loan agreements and the deeds of assignment were not 'frustrated', as alleged.

[92] Learned counsel for the plaintiff relied and submitted on the following cases:

(a) *Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd* [1991] 2 MLJ 251 at p 254 where the High Court judge, in explaining the doctrine of frustration, stated:

> The relevant law relating to discharge of a contract by frustration is encompassed in s 57(2) of the Contracts Act 1950 (Act 136) which reads:
>
> > A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> It appears that the language of the section envisages two main instances of frustration — when a contract to do an act becomes (a) impossible or (b) unlawful. *The frustration should be caused by some supervening and subsequent event occurring after the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not dischargea party of his contractual obligations.* ... (Emphasis added.)

(b) in *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695 (CA), Primakar Sdn Bhd ('Primakar') was an importer and dealer of motor cars. The first defendant which was a private limited company placed an order for a motor car for importation into this country. The order form was signed on the first defendant's behalf by its managing director, the second defendant. The first defendant then obtained finance from the plaintiff for the purchase of the car. The plaintiff purchased the car from Primakar and let it to the first defendant pursuant to a hire-purchase agreement entered into between them. The second defendant guaranteed repayment. Later, the car was seized by Royal Customs officers for default in the payment of the actual duty payable on the car. The first defendant then defaulted in paying the instalments due under the hire-purchase agreement. The

plaintiff brought an action against the defendants to recover the sums due under the hire-purchase agreement. The defendants defended the action on the following grounds: (i) that the plaintiff had sold a car to which it had no title; (ii) that the seizure of the car frustrated the contract. The defendants also brought a counterclaim for the loss suffered by the seizure. The learned judge found for the plaintiff on both points and dismissed the counterclaim. The defendants appealed and their appeal was dismissed by the Court of Appeal and in elaborating the doctrine of frustration, the Court of Appeal held as follows:

> [7] It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. *Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective.* Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite. (Emphasis added.)

[93] On the other hand, the defendant argued that the 'intervening events' frustrated the loan agreements and deeds of assignment.

[94] However, in *Kuala Lumpur Landmark* it was held that the 'supervening and subsequent event' *cannot* be 'self-induced'.

[95] So, the question is whether the intervening events alleged by the defendant namely regarding the Trust's JBHC Suit and decisions by the High Court and Court of Appeal, were self-induced.

[96] The answer lies in the grounds of judgment of the Court of Appeal dated 22 January 2019 in particular in paras 158–159, 161–162 and 166 which are reproduced below:

> [158] *The plaintiff claims that the Trust funds were fraudulently used by the third defendant to purchase the Additional 30 Units of apartments in Lanai Gumey leading to the unjust enrichment of the third defendant*. One thing which is quite clear from the scrutiny of the evidence is that the *third defendant bought the Additional 30 Units in his personal name* for the price of RM6,283,000 on 20 April 2009 from Galian Unggul Sdn Bhd and took 30 loans from *three banks namely Affin Bank to purchase 12 units*, CIMB Bank to purchase two units and the intervener, that is MBB, to purchase 16 units. The purchase was made after the first defendant had received the RM7m from the Trust and increased its share capital by that amount.

[159] The third defendant paid part of the initial payment of 10% in the sum of RM228.300 using two MBB cheques in the sums of RM100,000 dated 22 December 2009 and RM128,300 dated 29 January 2010. The two cheques came from the first defendant. These sums constituted the Trust fund as the first defendant's revenue was derived from rental proceeds received from the Trust's 27 Units. There is no dispute in respect of these two sums being used towards the payment of the 10 % deposit for the purchase of the Additional 30 Units. *The third defendant claimed that the money came from him. However, there is no shred of evidence including documentary evidence adduced by him to show that it was so*. On the other hand, the evidence that we glean from the R & M's 8th Report (exh P15) in particular the audited Financial Statement of the first defendant for the year ended 30 June 2009 reveals that the sum of RM784,753 represents the revenue from rental and maintenance charges, whereas the audited Financial Statement for the year ending 30 June 2010 reveals that the sum of RM969,800 at note 10 thereto also represents the revenue earned from rental and maintenance charges received during the year ending 30 June 2010. In addition, Appendix 11 to the R & M's 10th Report exhibit the Total Rental and Expenditure Report for the 27 Units for the years of 2008 to 2011.

...

[161] When the third defendant gave his witness statement, at Question 83, he said that the first defendant paid the two cheques each in the sum of RM128,300 and RM100,000 using the first defendant's MBB cheques. He also claimed that he paid the money to the first defendant first, however he could not show a scrap of evidence to prove his claim. A question which immediately arises is, why was there the need to pay the first defendant and the first defendant in turn issued the two cheques for the purchase of the Additional 30 Units whilst in truth the third defendant was the purchaser for the Additional 30 Units. The learned judge was correct in holding that it was the third defendant who should have issued the two cheques for the part payment of the 10% deposit. In our opinion that was, as was to be expected, the logical thing for the third defendant to do since he was the purchaser. *We agree with the learned judge that the third defendant could not be believed when he claimed that he paid from his own fund when he purchased the Additional 30 Units which was not supported by any evidence.* The truth is that the first defendant's 2 cheques show that the payments came from the rental belonging to the Trust which was derived from the tenancy of the 27 Units. The defence contention that these payments did not come from the Trust cannot therefore be accepted.

[162] The third defendant took 30 loans from three banks to pay for the balance purchase price of 90%. For this purpose, he took 16 loans for 16 units from the intervener, *12 loans for 12 units from Affin Bank* and two loans for two units from CIMB. Evidence is led to show that the security for the loans of 90% from the intervener and Affin Bank was the assignment of the monthly rental proceeds of the Trust's 27 Units. This evidence can be discerned from the first defendant is letter dated 11 January 2011 (exh P250), signed by the third defendant as its director, and sent to the intervener wherein he undertook to remit all rental proceeds obtained from the tenancy agreement dated 14 August 2008 with MINDEF. This letter states that the remittance of all rental proceeds from the said tenancy agreement 'only to the extent of the loan sum payable by our director, Mr Dinesh.

A ...

[166] Accordingly, we are of the opinion that the above documents show that the monthly payments for *the 30 loans extended to the third defendant* were paid by the assignment of the rental proceeds earned by way of secret profits from the 27 Units belonging to the Trust, *which constituted fraud, unjust enrichment and/or monies had and received from the Trust.* Based on the evidence adduced at the trial and there being no plausible evidence in rebuttal, the learned judge was correct in concluding that these Additional 30 Units were in fact purchased using the Trust monies, and in granting the declaration that the Trust is the owner of these Additional 30 Units as well as specific and injunctive reliefs. (Emphasis added.)

[97] The third defendant referred to in the above Court of Appeal's grounds of judgment refers to the defendant herein.

[98] The defendant's response to the arguments put forth on behalf of the plaintiff can be summarised as follows:

(a) question 2 is not a question on the construction of a legal agreement or law. It is a question of facts which arise from the Trust's JBHC Suit;

(b) the plaintiff cannot just produce the grounds of judgment and expect this court to make a finding on an interlocutory proceeding without giving the defendant his day in court;

(c) the defendant has pleaded that the Trust's JBHC Suit made orders giving away properties from fraudulent representation by the Trust that they paid for the properties;

(d) the plaintiff's action in filling the plaintiff's KLHC Suit itself shows the loan agreements and/or the deeds of assignment were indeed frustrated from the orders the plaintiff sought;

(e) the plaintiff have acknowledged that the loan agreements have been frustrated when the plaintiff have demanded payment from the Trust, this tantamount to estoppel by conduct; and

(f) the plaintiff ought to have named the Trust as a party to the proceedings herein.

[99] The plaintiff's response to the above arguments can be summarised as follows:

(a) it was the defendant himself who was first relying on the aforesaid courts' decisions to mount his counterclaim herein against the plaintiff, in that the loan agreements and the deeds of assignment had been 'frustrated' by the aforesaid courts' decisions;

(b) having relied on these courts' decisions, the defendant cannot now preclude the plaintiff from relying on the same to respond to the allegations raised by the defendant in his counterclaim;

(c) in this regard, the defendant cannot approbate and reprobate as he wishes (*Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan* [2020] 12 MLJ 54 (FC)). Having elected to adopt the position to rely on the courts' decisions in the Trust Proceedings to mount his counterclaim herein, the defendant cannot now be permitted to preclude the plaintiff from relying on the same;

(d) the plaintiff is entitled to rely on the grounds of judgment of the High Court and Court of Appeal pertaining to the Trust's JBHC Suit. The courts had made clear findings of facts against the defendant, in particular that the defendant had breached his duty to the Trust and had misuse of monies belonging to the Trust to purchase the 12 properties. The plaintiff relied on the House of Lords case of *Committee for Privileges the Ampthill Peerage* [1977] AC 547 which affirmed the general principle of the finality of a judgment by which parties are bound:

> ... the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law — by every system of law — of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered as a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to conclude the matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta. *Sometimes it is the parties to the litigation and those who claim through them who are bound by the judgment; but sometimes it is the whole world which must accept the decision* ... (Emphasis added.)

(e) the courts' findings in the Trust's JBHC Suit that the defendant had misused monies belonging to the Trust to purchase the 12 properties resulting in the 12 properties being ordered to be returned to the Trust are final and binding upon the defendant, and this same issue ought not to be re-litigated by this court;

(f) the loan agreements are separate and independent of the status of the 12 properties, including the deeds of assignment. In this regard, despite the 12 properties being ordered to be returned to the Trust, the defendant is still obligated to repay the facilities under the loan agreements. The plaintiff's arguments in respect of question 1 are reiterated;

(g) insofar as the plaintiff's KLHC Suit is concerned, the plaintiff has not been inconsistent in its position:

(i) the plaintiff filed the plaintiff's KLHC Suit against three parties, that is the defendant, the Trust (acting via receiver and manager), and Mampu Jaya Sdn Bhd (in liquidation) (ie the developer);

(ii) after the writ and statement of claim were filed, no statement of defence or subsequent pleading was filed by any party;

(iii) the plaintiff's KLHC Suit was then struck out (not dismissed) by the High Court on 20 March 2019;

(iv) the statement of claim in the plaintiff's KLHC Suit primarily concerned the deeds of assignments in relation to the 12 properties (which are separate and independent of the defendant's obligations to repay the facilities under the loan agreements);

(v) as per paras 14–22 of the said statement of claim, the plaintiff's KLHC Suit was filed in the light of the High Court's decision of 22 December 2016 in the Trust's JBHC Suit which, inter alia, declared the Trust to be the owner of and/or was entitled to all benefits arising from the 12 properties;

(vi) in this regard, it was a prudent and necessary action taken by the plaintiff to protect its rights arising from the deeds of assignments in relation to the 12 properties; and

(vii) the plaintiff's KLHC Suit was filed after the High Court in the Trust's JBHC Suit delivered its decision on 22 December 2016, but before the Court of Appeal delivered its decision on 17 January 2019.

(h) plaintiff did not acknowledge the loan agreements have been frustrated. Vide the plaintiff's solicitors letter dated 25 September 2019, the plaintiff, through its then solicitors, was writing to the Trust's then solicitors to enquire with regard to the Trust's position in relation to the 12 properties that had been ordered by the courts to be transferred to the Trust, bearing in mind that the facilities had not been fully repaid by the defendant. The plaintiff did not demand any payment from the Trust as alleged by the defendant. The plaintiff also did not acknowledge nor admit that the loan agreements or the deeds of assignments have been frustrated.

(i) there is no reason for the Trust to be named in the present action as:

(i) the Trust is not a relevant party to the plaintiff's action herein as it is a recovery action concerning only the plaintiff and the defendant pursuant to the loan agreements. The Trust is not a party to the loan agreements;

(ii) on the other hand, in the defendant's counterclaim herein, it is the defendant's obligations and/or liberty, and not the plaintiff's, to

name the Trust as a defendant in the defendant's counterclaim herein, if at all, but the defendant had failed to do so;

(iii) hence, the defendant's failure to do so could only confirm that the Trust is not a relevant party to either the plaintiff's action or the defendant's counterclaim herein; and

(iv) further, if the defendant has taken the position that the loan agreements and the deeds of assignments have been 'frustrated' by the courts' decisions in the Trust's JBHC Suit, and thus the defendant need not repay the facilities to the plaintiff, then why did the defendant continue to repay the monthly instalments to the plaintiff until September 2019, bearing in mind this was after the High Court and the Court of Appeal had delivered their decisions on 22 December 2016 and 17 January 2019 respectively. This must mean the defendant took the view that the defendant was still obligated to repay the facilities to the plaintiff, despite the decisions of the High Court and the Court of Appeal ordering the 12 properties to be returned to the Trust. The defendant cannot approbate and reprobate (*Nabors Drilling*).

[100] I accept learned counsel for the plaintiff's above submissions in response to the arguments raised by the defendant especially where there is no factual dispute and in my judgment:

(a) question 2 is regarding the findings and what was determined by the High Court and Court of Appeal in respect of the Trust's JBHC Suit;

(b) that is a matter of construction and falls squarely within the principle laid down in *Petroliam Nasional Bhd* where the Federal Court it was held as follows:

> Clearly, this issue is a question of law which can be resolved by reference and *interpretation of the relevant legislations* and *contractual documentations without having to go for a full trial of the action*. It is trite that *where the question of construction is a dominant feature of a case, the court should proceed to determine that issue. It follows that the whole case does not have to be disposed of but it is sufficient if substantial matters can be disposed of (see Korso Finance Establishment Anstalt v John Wedge (unreported, 15 Feb 1994, CA Transcript No 14/387)).* (Emphasis added.)

(c) the 'question of construction is a dominant feature' of the plaintiff O 14A application and involves the relevance and impact of the decisions of the High Court and Court of Appeal pertaining to the Trust's JBHC Suit;

(d) it is clear from the earlier-quoted paragraphs from the grounds of judgment of the Court of Appeal dated 22 January 2019 that the

decisions of the High Court and Court of Appeal in the Trust's JBHC Suit are not only relevant but are applicable to the present case;

(e) this court cannot ignore the findings made by the High Court in the Trust's JBHC Suit which were affirmed on appeal by the Court of Appeal;

(f) the decision of the Court of Appeal is binding upon this court and this court also cannot arrive at a finding or conclusion which is inconsistent or in conflict with that of the Court of Appeal especially when they concern facts which are relevant to the instant case;

(g) it must be emphasised that it is the defendant himself who raised the issue of the 'intervening events' regarding the Trust's JBHC Suit and its subsequent proceedings. Therefore, the defendant himself made matters relating to the Trust's JBHC Suit relevant including the decisions by the High Court and Court of Appeal pertaining thereto;

(h) res judicata and issue estoppel in effect applies against the *defendant* and not the against plaintiff. In connection with this it was held by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 as follows:

> The cause of action estoppel arises when *rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action*, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. *The said cause of action may not be relitigated between the same parties because it is res judicata*. (Emphasis added.)

(i) the issues pertaining to the plaintiff's KLHC Suit is not relevant here. These are matters which pertain to questions 1 and have already been dealt with and decided earlier in this judgment in that the loan agreements are separate and independent of the deeds of assignment. The plaintiff is entitled to pursue its claim against the defendant for recovery of the amounts outstanding under the facilities and this would not affect the plaintiff separate right over the assigned 12 properties;

(j) in the absence of other pleadings in the plaintiff's KLHC Suit apart from the writ and statement of claim, it is accepted that the plaintiff's KLHC Suit was not decided on the merits;

(k) para 7 of the High Court Order dated 22 December 2016 in the Trust's JBHC Suit, inter alia, declared that the defendant had committed fraud. The Court of Appeal upheld the said decision of the High Court. The High Court and Court of Appeal found, inter alia, the fact that monies belonging to the Trust were misused by the defendant to purchase the 12 properties and had ordered for the 12 properties to be returned to the Trust;

(l) therefore, the 'loss' of the 12 properties or the defendant's argument of the loss of his 'right to redeem' them has nothing to do with the plaintiff and it is not of the plaintiff's doing;

(m) the defendant's argument that the plaintiff knew or should have intervened in the Trust's JBHC Suit is irrelevant and is without merits. This is further supported by the fact that CIMB had attempted to intervene (though later at the Court of Appeal stage) but CIMB's intervener application was not allowed. On this issue the para 190 of the Court of Appeal's grounds of judgment is clear:

> [190] It must be taken to be well settled that once a party has intervened in an action, they must establish a claim against the parties in the existing action for which they then seek relief. The intervener has no cause of action against the plaintiff and is merely seeking to impeach the judgment on grounds that it is a nullity as they were not made a party. In reality the intervener has a claim against the third defendant as their borrower and their 'assignor'. The judgment is between the Trust and the third defendant. *The intervener's rights against the third defendant as borrower are unaffected and if affected are to be ventilated in separate proceedings between them*. While the intervener has granted 16 loans to the third defendant, *the legal and binding effect of the intervener's claim for these loans from the third defendant as the borrower are not diminished nor affected in any manner by the judgment*. (Emphasis added.)

(n) I have also considered that the Trust's JBHC Suit would have caused some confusion on the part of the plaintiff who was not privy to the matters concerning the said suit. It is based on this reason that I accept the plaintiff's argument that the plaintiff's KLHC Suit was filed after the High Court in the Trust's JBHC Suit delivered its decision on 22 December 2016, but before the Court of Appeal delivered its decision on 17 January 2019. It is not wrong for the plaintiff to have waited to see the determination of these proceedings before acting.

[101] I will not go into the cases that the defendant had referred to regarding question 2 as they are not on point and are factually distinguishable.

[102] The fact of the matter is that based on the cases cited by the plaintiff and the findings of the High Court in the Trust's JBHC Suit as affirmed by the Court of Appeal (and Federal Court), the frustration alleged by the defendant is in fact self-induced and therefore cannot discharge the defendant of his contractual obligations under the loan agreements and the defendant's obligation to repay the plaintiff for the sums due and owing under the facilities.

[103] As such, I answered question 2 in the *negative*. The loan agreements and/or the deeds of assignment were not frustrated by the Johor Bahru High Court order dated 22 December 2016 and the Court of Appeal Order dated 17 January 2019.

A QUESTION 3: WHETHER THE DEFENDANT CAN MAINTAIN AND/OR SUCCEED IN HIS COUNTERCLAIM, WHICH AROSE FROM HIS ILLEGAL AND/OR UNLAWFUL ACTS

B **[104]** Similar to the situation with question 1, the factual part of question 3 in the plaintiff's O 14A application has been dealt with in question 2.

[105] Therefore, what is left to consider is the legal issue pertaining to question 3.

C

[106] To reiterate the relevant facts in relation to question 3 which have been determined by the High Court and Court of Appeal in the Trust's JBHC Suit:

(a) the 12 properties (as part of the 30 properties) were ordered to be returned to the Trust due to the defendant's misuse of the monies D belonging to the Trust to purchase the 12 properties;

(b) it was declared in the Trust's JBHC Suit, inter alia, that the defendant had committed fraud and conspiracy and was dishonest. Paragraph 7 of the High Court Order dated 22 December 2016 states as follows:

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> Satu deklarasi bahawa *Defendan-Defendan Pertama sehingga Ke-7 telah melakukan suatu fraud dan berkomplot* antara satu sama lain dengan maksud utama untuk membawa kerugian kepada Plaintif dan/atau bahawa Defendan-Defendan tersebut adalah penyerta-penyerta bersama dan *telah secara tidak jujur* membantu satu sama lain dalam melakukan fraud dan F komplot itu terhadap Plaintif. (Emphasis added.)

[107] At para 202 of the Court of Appeal's grounds of judgment, it was held as follows:

> [202] In all the circumstances, reason and justice point to the inevitable conclusion G that *His Lordship's appreciation of the evidence and assessment of the credibility of the witnesses tested against the totality of evidence cannot be faulted*. In the end, all of the factors and evidence to which we have alluded are sufficient to support our view that there is a good deal of substance in the arguments put forward by learned counsel for the plaintiff that the findings made by the learned judge were not erroneous. *We are* H *therefore left with the feeling that there should be no reasons that the decision of the learned judge in the instant action under consideration in this appeal should be set aside*. In the result, these appeals are dismissed and *the decision and order of the learned judge are affirmed unanimously*. We award costs to the plaintiff. (Emphasis added.)

I **[108]** It was submitted on behalf of the plaintiff that in the light of the defendant's said illegal and unlawful acts, it is settled law that the defendant cannot maintain and cannot succeed in his counterclaim against the plaintiff.

[109] The following cases were relied by the plaintiff:

(a) *Holman et al v Johnson, alias Newland* (1775) 1 Cowp 341 at p 343 where it was held:

> The principle of public policy is this; ex dolo malo non oritur actio. *No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act*. (Emphasis added.)

(b) *Clunis v Camden and Islington Health Authority* [1998] QB 978 at p 987 where the English Court of Appeal held:

> But whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action *if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts*. (Emphasis added.)

[110] *Holman* was referred in the Court of Appeal case of *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594 which quoted the above passage though more extensively.

[111] Therefore, it is clear that the defendant cannot maintain his counterclaim based on his illegal act and neither can he rely on estoppel against the plaintiff arising from that illegal act.

[112] Therefore, I answered question 3 in the *negative*. The defendant the defendant cannot maintain and/or succeed in his counterclaim which arose from his illegal and/or unlawful acts.

CONCLUSION

[113] I would be remiss if I do not deal with the fraud argument raised by the defendant which he argued cannot be determined by way of the applications.

[114] The defendant claimed that the Trust's solicitors gave the court the undertaking that they will pay for the 12 properties and pay the plaintiff but have now failed to pay.

[115] Even assuming such an undertaking is true:

(a) firstly, the defendant did *not* plead fraud against the plaintiff; and

(b) secondly, the defendant pleaded fraud against the receiver and manager of the Trust and/or its solicitors (paras 24–25, 32 and 52 of the counterclaim).

[116] In any event, the defendant's abovesaid argument does not concern the plaintiff whose claim against the defendant (not the Trust) is based on the loan agreements and facilities granted.

[117] It bears repeating that the defendant's challenge to the plaintiff's claim is premised upon the defendant's claim that the plaintiff had failed to protect the plaintiff's rights over the 12 properties. This is also the basis of the counterclaim.

[118] The defendant had himself pleaded in para 60 of his defence and counterclaim:

> However, the plaintiff had failed, neglected and/or refused to take any action to protect *their rights, title and interest in the said properties* thereby refusing the defendant the right to redeem the said 12 properties. (Emphasis added.)

[119] The words 'their right, title and interest' here means the plaintiff's rights, title and interest. Therefore, notwithstanding that the loan agreements and deeds of assignment are separate and independent of each other, the right is the *plaintiff's*, not the defendant's. How the plaintiff intends to exercise that right is entirely up to it.

[120] The defendant has no right to demand that the plaintiff exercise that right either before initiating this recovery action against the defendant or at all (*Esah bt Abdul Ghani*).

[121] It is clear to that the predicament the defendant finds himself in arose from his own illegal or wrongful acts as determined by the High Court and Court of Appeal in the Trust's JBHC Suit.

[122] He cannot rely on res judicata nor estoppel to assist him. Instead, these equitable principles work in favour of the plaintiff.

[123] The defendant has failed to raise any triable issue in respect of the plaintiff O 14 application and why judgment should not be given against him (*Kayu Raya*).

[124] In respect of the plaintiff O 14A application, the questions posed by the plaintiff are suitable to be decided by way of this application. They do not involve any dispute of material facts. They revolve around the decisions of the High Court and Court of Appeal and the impact of those decisions on the present action in particular the counterclaim. The questions posed are questions of construction and are the dominant feature of the instant case. These questions, when answered, substantially disposed of the counterclaim

which includes issues raised in the defence (*Petroliam Nasional*). A

[125] For the reasons stated above, I allowed both the plaintiff's O 14 and O 14A applications and after hearing arguments on costs, awarded costs of RM10,000 for the plaintiff's O 14 application and RM10,000 for the plaintiff's O 14A application in favour of the plaintiff. B

Plaintiff's O 14 application allowed with costs of RM10,000; plaintiff's O 14A application allowed with costs of RM10,000.

Reported by Dzulqarnain Ab Fatar C

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